

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
September 18, 2009 Session

ROSANNE BUCARO v. JEFFREY ROBERT BUCARO

Appeal from the Circuit Court for Williamson County
No. 04182 Robbie T. Beal, Judge

No. M2009-00432-COA-R3-CV - Filed January 25, 2010

Husband sought to modify his alimony payments because of a significant change in income. The trial court dismissed Husband's petition, awarded Wife a judgment for unpaid alimony, and ordered Husband to pay the judgment within ninety days. The court also denied Husband's request for the elimination of his obligation to pay his daughter's college tuition. Husband appeals the trial court's failure to reduce his alimony, its order that he pay the alimony judgment within ninety days, its failure to relieve him of his obligation to pay his daughter's tuition, and its award of attorney fees to Wife. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

ANDY D. BENNETT, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, P.J., M.S., and RICHARD H. DINKINS, J., joined.

Connie Reguli, Brentwood, Tennessee, for the appellant, Jeffrey Robert Bucaro.

Deana Hood and John M. Milazo, Franklin, Tennessee, for the appellee, Rosanne Bucaro.

OPINION

FACTUAL AND PROCEDURAL BACKGROUND

Jeffrey Bucaro ("Husband") and Rosanne Bucaro ("Wife") divorced on August 30, 2005, after a twenty-one-year marriage. Under the terms of the Marital Dissolution Agreement ("MDA") that the parties negotiated, Husband agreed to pay Wife rehabilitative alimony based on the following schedule:

| | |
|-----------------------------|---------------|
| August 30, 2005 - June 2006 | \$3,032/month |
| July 2006 - June 2007 | \$4,000/month |

| | |
|-----------------------|---------------|
| July 2007 - June 2010 | \$3,000/month |
| July 2010 - June 2012 | \$2,000/month |

The MDA also included a provision requiring Husband to pay the college tuition of the parties' minor daughter ("Daughter") for eight semesters at Middle Tennessee State University.¹

At the time of divorce, Husband's income was approximately \$220,000 a year. In June 2007, Husband's position with his employer was eliminated. Husband received a severance package under which he continued to earn his base salary of \$189,000 for one year. Husband had no source of income other than this severance from June until October 2007, at which time he began a new job making approximately \$120,000 per year. Thus, from October 2007 until June 2008, Husband was earning his new income, as well as the severance from his former employer. In July 2008, Husband's severance expired.

On June 29, 2007, after Husband's employment was terminated, he filed a Petition for Modification of Alimony, Supplemental Child Support, and Other Relief, alleging that a substantial and material change in circumstances had occurred due to the elimination of his former position and the fact that Wife had found employment. Wife answered Husband's petition on September 14, 2007, denying that any substantial and material change in circumstances had occurred warranting a modification in Husband's alimony or child support payments. Additionally, Wife filed a Petition for Civil Contempt of Court on July 23, 2008, alleging that Husband failed to pay alimony in June and July of 2008, as well as Daughter's college tuition in the amount of \$2,037.

A hearing was held on August 18, 2008. In an order dated August 22, 2008, the trial court found that there was not a material change in circumstances at the time Husband filed his petition due to the one-year \$189,000 severance package that Husband had received when his position was eliminated.

Husband filed an Amended and Supplemental Petition for Modification of Alimony, Supplemental Support, and Other Relief on August 22, 2008, noting that his year-long severance had expired and his income was one-half the amount it was at the time of divorce.

¹ The parties have two other daughters who are of majority age. Under the terms of the MDA, Husband also agreed to continue providing support for one of these daughters, still in college, in the amount of \$7,100 for four semesters. Additionally, the parenting plan stipulated that Husband was required to pay Wife child support for Daughter in the amount of \$1,484 twice per month until Daughter graduated from high school and reached the age of eighteen. This appeal concerns only the college tuition allegedly owed for the minor daughter, who had reached the age of majority at the time of the final hearing in January 2009.

Husband also asked that his obligation to pay Daughter's college tuition be eliminated because of her lack of good faith dealing as a third-party beneficiary. Husband claimed that he negotiated the terms of the MDA under the belief that his then-existing relationship with Daughter would continue. He asserted that Daughter had instead stopped communicating with him and had blocked him from viewing her course enrollment or how she was performing in school.

Wife filed an Amended Petition for Civil Contempt of Court on September 11, 2008, alleging that Husband failed to make his \$3,000 alimony payments for the months of June, July, and August 2008. In addition to the \$2,037 that Wife claimed Husband owed for Daughter's tuition in the original petition for contempt, Wife asserted that Husband had failed to pay this obligation again for the Fall 2008 semester, causing Wife to incur an additional \$1,475 in damages. In his answer, Husband admitted to not paying Wife alimony for the months of June, July, and August 2008. Husband also admitted that he failed to pay Daughter's Fall 2008 tuition because of an inability to pay, but otherwise asserted that he had paid all monies due.

A final hearing was held on January 20, 2009, and the court issued an order on February 5, 2009. The court dismissed Husband's Amended and Supplemental Petition to Modify Alimony, Supplemental Support, and Other Relief. The court found a "material and significant change in circumstances" in Husband's income but held that he still had the ability to pay the same amount of alimony as set forth in the MDA. Additionally, the court found no change in circumstances in the relationship between Husband and Daughter and ordered Husband to continue paying Daughter's tuition as stipulated in the MDA. The court awarded Wife a judgment of \$22,500 for unpaid alimony and stipulated that Husband had ninety days from the date of the order to pay it in full or face possible contempt.² Additionally, the court awarded Wife \$12,250 in attorney fees and \$8,750 for tuition for the parties' children.³

² The trial court actually issued two orders on February 5, 2009. In its first order, the court found Husband in civil contempt of court for failure to pay alimony for one two-week period in December 2007. The court sentenced Husband to ten days in jail but stipulated that the sentence would be vacated if the judgment was paid in full by April 20, 2009. That same day, the court entered an order *sua sponte* vacating its finding of contempt and vacating the jail sentence because the court had erroneously ruled that Husband had failed to make alimony payments in December 2007 when, in fact, Wife had not alleged a failure to pay in December 2007. In its second order, the court ordered Husband to pay Wife \$22,500 in unpaid alimony within ninety days of February 5, 2009, and warned that "failure to pay may result in a contempt action being filed against him by [Wife] in this cause."

³ The court stipulated that \$2,250 of the \$8,750 tuition judgment was for the parties' adult daughter. This amount is not an issue on appeal. The remaining \$6,500 for Daughter's tuition for the Fall 2007 through
(continued...)

STANDARD OF REVIEW

The trial court's findings of fact are reviewed de novo on the record with a presumption of correctness unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d). Conclusions of law are reviewed de novo with no presumption of correctness. *Frye v. Blue Ridge Neuroscience Ctr., P.C.*, 70 S.W.3d 710, 712 (Tenn. 2002).

ANALYSIS

Husband challenges the trial court ruling on four issues on appeal—its failure to reduce Husband's alimony, its order that Husband pay the alimony judgment within ninety days, its failure to relieve Husband of his obligation to pay Daughter's tuition, and its award of Wife's attorney fees.

Amount of Husband's Alimony

Husband first asserts that the trial court erred in failing to reduce his alimony payments. Husband contends that his alimony should be reduced based on a significant decrease in his income following divorce and the disparity in the distribution of marital assets at the time of divorce. In its February 5, 2009 order, the trial court found that there did exist a "material and significant change in circumstances in [Husband's] income." However, because neither Husband's ability to pay nor Wife's need had changed, the original amount of alimony was deemed adequate.

Modifications of rehabilitative alimony may be granted only upon a showing of a substantial and material change in circumstances since entry of the original support order. Tenn. Code Ann. § 36-5-121(e)(2). The party seeking the modification has the burden of proving the substantial and material changes that justify it. *Elliot v. Elliot*, 825 S.W.2d 87, 90 (Tenn. Ct. App. 1991). The change in circumstances must have occurred after the original award. *Brewer v. Brewer*, 869 S.W.2d 928, 935 (Tenn. Ct. App. 1993). Such changes are not material if they were contemplated by the parties at the time of divorce. *Seal v. Seal*, 802 S.W.2d 617, 620 (Tenn. Ct. App. 1990). A change is considered substantial if it has a significant impact on either the recipient's need or the obligor's ability to pay. *Bogan v. Bogan*, 60 S.W.3d 721, 728 (Tenn. 2001). A material change in circumstances is one that is "unforeseeable, unanticipated, or not within the contemplation of the parties at the time of the decree." *Gentry v. Gentry*, No. M2007-00876-COA-R3-CV, 2008 WL 275881, at *1 (Tenn. Ct. App. Jan. 31, 2008) (citing *Bogan*, 60 S.W.3d at 728).

³(...continued)

Spring 2009 semesters is an issue in this appeal.

Once the petitioner establishes a substantial and material change in circumstances, he or she must then demonstrate that a modification of the award is justified under the factors relevant to an initial award of alimony, particularly the receiving spouse's need and the paying spouse's ability to pay. *Bogan*, 60 S.W.3d at 730. Those factors are found in Tenn. Code Ann. § 36-5-121(i). Where there has been a change in circumstances, "the ability of the obligor spouse to provide support must be given equal consideration to the obligee spouse's need." *Gentry*, 2008 WL 275881, at *2 (citing *Bogan*, 60 S.W.3d at 730).

Modification of a spousal support award is factually driven. A trial court's decision to modify its award is given wide latitude within the trial court's range of discretion. *Bogan*, 60 S.W.3d at 727. "A trial court abuses its discretion only when it 'applie[s] an incorrect legal standard, or reache[s] a decision which is against logic or reasoning that cause[s] an injustice to the party complaining.'" *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001) (alteration in original) (quoting *State v. Shirley*, 6 S.W.3d 243, 247 (Tenn. 1999)).

In order to determine whether a substantial and material change in circumstances has occurred, we must compare the circumstances as they existed at the time of the divorce with the circumstances at the time Husband filed his petition for modification. Husband's amended petition for modification of alimony notes that his income decreased by one-half the amount it was at the time of the final divorce decree because his position was eliminated with his former employer and his severance had expired. The trial court determined that Husband's income during this time period went from approximately \$220,000 to \$120,000 and that this amount constituted a "material and significant change" in Husband's circumstances.⁴

We conclude that Husband's reduction in income does constitute a substantial and material change in circumstances. However, even where material and substantial changes exist, it is within the discretion of the trial court to determine whether a modification is warranted. Husband must also demonstrate that a modification of the award is justified under the factors relevant to an initial award of alimony found in Tenn. Code Ann. § 36-5-121(i), particularly Wife's need and Husband's ability to pay. *See Bogan*, 60 S.W.3d at 730.⁵

⁴ Husband takes issue with the trial court's finding of a "material and significant change" in Husband's circumstances rather than the "substantial and material change" required under Tenn. Code Ann. § 36-5-121(e)(2). We believe it was the intent of the trial court to state "substantial and material," and because there is sufficient evidence to support such a finding, we find Husband's argument to be without merit.

⁵ *Bogan* references Tenn. Code Ann. § 36-5-101, which was amended by deleting the section in its entirety and substituting § 36-5-121 by 2005 Tenn. Laws Pub. Ch. 287.

The trial court found that Husband's ability to pay and Wife's need had not changed, and therefore, there should be no reduction in alimony. At trial, the court ruled that despite a reduction in income, the amount Husband is required to pay "is not extraordinary and is not unreasonable." Further, the court found that Husband had seven months to rearrange his budget once he found out his job was terminated but had failed to alter his lifestyle. The court also concluded that there still existed a need for Wife. She had "considerable debt," and "[s]he wants to further her education, which is what rehabilitative alimony is about." Given these factual findings by the trial court, we do not disagree with its conclusion that a modification of alimony was not justified under the factors relevant to an initial award of alimony under Tenn. Code Ann. § 36-5-121(i).

In appealing the court's decision not to reduce alimony, Husband emphasizes the disparity in the distribution of marital assets at the time of divorce. Husband alleges that Wife received 80% of the assets from the marital estate upon divorce. The "separate assets of the parties" is one factor that courts must consider in determining an initial award of alimony. Tenn. Code Ann. § 36-5-121(i)(7). As a result, it is also one of the 12 factors that courts must evaluate in contemplating a modification of the award once the petitioner proves a substantial and material change in circumstances. *See Bogan*, 60 S.W.3d at 730. However, "the two most important considerations in modifying a spousal support award are the financial ability of the obligor to provide for the support and the financial need of the party receiving the support." *Id.* (citing *Givler v. Givler*, 964 S.W.2d 902, 906 (Tenn. Ct. App. 1997)).

We have already discussed these two most important factors and concluded that Wife's need and Husband's ability to pay persisted after the substantial and material change in Husband's income. Additionally, at trial, the court reminded the parties that they negotiated the terms of the MDA and, at the time of the final divorce decree, both represented to the court that they believed it to be a fair and equitable division of the assets. The court further stated that the amount of alimony originally contemplated by the parties was not "outrageous, egregious, or otherwise unreasonable." In light of the foregoing, we find no abuse of discretion and affirm the trial court's dismissal of Husband's petition to modify alimony.

Order to Pay Alimony Judgment Within Ninety Days

The trial court concluded that Husband willingly failed to pay \$22,500 in alimony that he had the ability to pay at the time it was due. Therefore, the court ordered Husband to pay the judgment within ninety days of the date of the February 5, 2009 order. The court stated that Husband's "failure to pay may result in a contempt action being filed against him by [Wife] in this cause." Husband contends that the trial court erred in subjecting him to

contempt for failure to pay the \$22,500 judgment within ninety days. Husband argues that an order for contempt requires a finding of willful disobedience that was absent because he lacked the ability to pay.

We need not address whether Husband had the ability to make his alimony payments because the court did not impose an order of contempt. Husband overlooks the fact that the court stated only that Husband's failure to pay within ninety days *might* subject him to a petition for contempt from Wife. In its first order on February 5, 2009, the court sentenced Husband to ten days in jail for one count of civil contempt and stated that Husband could purge himself of that count by payment of the \$22,500 judgment. The court specifically vacated this finding of contempt and jail time in a second order on February 5, 2009, and stated instead that failure to pay within ninety days *could* subject Husband to a potential cause of action for contempt from Wife. We therefore affirm the trial court's order that Husband pay \$22,500 in unpaid alimony within ninety days.

Husband's Obligation to Pay Daughter's College Tuition

The trial court also ordered Husband to continue to pay Daughter's college tuition as specified in the MDA. The court awarded Wife a judgment of \$6,500 for tuition for the fall semester of 2007, the spring and fall semesters of 2008, and the spring semester of 2009. Husband argues that the court erred in failing to relieve him of his obligation to pay Daughter's tuition because Daughter failed to make a good faith effort to communicate with Husband regarding her schooling. Specifically, Husband was blocked from the online system used to pay Daughter's tuition, and Daughter neglected to notify Husband of her grades or course enrollment. In support of his argument, Husband points to decisions in other jurisdictions that have held that a parent's obligation to support an adult child in college is excused when the child has repudiated his or her relationship with that parent. *See, e.g., McKay v. McKay*, 644 N.E.2d 164, 168 (Ind. Ct. App. 1994); *Hambrick v. Prestwood*, 382 So. 2d 474, 477 (Miss. 1980).

The terms of the MDA negotiated between Husband and Wife required Husband to "pay [Daughter's] college tuition for eight semesters in an amount not to exceed the tuition rates of Middle Tennessee State University." The MDA did not attach any conditions, related to his personal relationship with Daughter or otherwise, to Husband's fulfillment of his duty to pay Daughter's tuition. The MDA includes a standard merger or integration clause stating that it represents "the entire understanding of the parties" and that "[t]here are no representations, warranties, or promises other than expressly set forth herein."

Additionally, it is undisputed that the relationship between Husband and Daughter was poor. Husband insists that his relationship with Daughter became strained only after the

divorce and that he did not anticipate that his relationship with Daughter would deteriorate when he agreed to pay her tuition. However, testimony at trial indicated that their relationship was strained before the divorce and during the time that the MDA was negotiated. The parenting plan for Daughter substantiates that testimony. Wife was designated as the primary residential parent, spending 365 days per year with Daughter, and Wife was to have full responsibility for the care of Daughter, as well as complete decision-making authority. We conclude, therefore, that Daughter did not repudiate her relationship with Husband as it stood at the time the MDA was negotiated. We agree with the trial court's assessment that "[t]here exists no change in circumstance with regard to [their] relationship."

Finally, Husband argues that because Daughter had reached the age of majority, his tuition obligation under the MDA inured to Daughter, not to Wife. Husband asserts, therefore, that Wife lacked standing to collect these amounts against Husband. This issue was not raised by Husband before the trial court and is thus waived on appeal. *See In re M.L.P.*, 281 S.W.3d 387, 394 (Tenn. 2009).

Award of Wife's Attorney Fees

Finally, Husband contends that the trial court erred in awarding Wife \$12,250 in attorney fees. The MDA that the parties negotiated at the time of divorce specifies that "[i]n the event it becomes reasonably necessary for either party to institute legal proceedings to procure the enforcement of any provisions of this Agreement, he or she shall also be entitled to a judgment for reasonable expenses, including . . . attorney's fees."

The decision of whether to award attorney fees in support modification proceedings is discretionary with the trial court and will not be disturbed absent a showing of an abuse of discretion. *McCarty v. McCarty*, 863 S.W.2d 716, 722 (Tenn. Ct. App. 1992). A trial court abuses its discretion only when it "applies an incorrect legal standard, or reaches a decision which is against logic or reasoning or that causes an injustice to the party complaining." *Eldridge*, 42 S.W.3d at 85. "No precise parameters have been set for the exercise of discretion, but, generally, an award of fees should be 'just and equitable under the facts of the case.'" *Evans v. Evans*, No. M2002-02947-COA-R3-CV, 2004 WL 1882586, at *17 (Tenn. Ct. App. Aug. 23, 2004) (quoting *Sherrod v. Wix*, 849 S.W.2d 780, 785 (Tenn. Ct. App. 1992)). One generally held principle is that "the successful alimony recipient should not have to pay the cost of defending his or her entitlement, especially if that payment would necessarily come from the support the recipient needs for routine living expenses." *Id.*

We conclude that Wife should not have to pay the cost of defending her entitlement to alimony and Daughter's right to tuition. We find no abuse of discretion in the trial court's award of attorney fees to Wife.

CONCLUSION

The decision of the trial court is affirmed. Costs of appeal are assessed against the appellant, for which execution may issue if necessary.

ANDY D. BENNETT, JUDGE